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In The
Supreme Court of the United States

CHANDRA SPENCER; FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE, A Professional Corporation; COUNTY OF LOS ANGELES,

Petitioners,

vs.

RAUL GONZALEZ, JR.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Ninth Circuit's analysis of and determination that a public entity's outside counsel is a state actor for purposes of 42 U.S.C. § 1983 inconsistent with the precedents of this Court and in conflict with the decisions of the other circuits?

2. Should an outside counsel for a public entity who is deemed to be a state actor for purposes of section 1983 be precluded from asserting the defense of qualified immunity simply because she is a "private party"?

3. Does a civil plaintiff suing a public entity have a constitutionally protected privacy right which bars the entity from sharing personal information about the plaintiff, which is related to the subject action, with the entity's defense counsel?

CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held company owning 10% or more of the corporation's stock.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was reported at 64 Fed.Appx. 91 (9th Cir. 2003), was filed on May 13, 2003 and is reprinted at Appendix A.[1]

The United States District Court of the Central District of California's unreported memorandum order granting Chandra Spencer and Franscell, Strickland, Roberts & Lawrence's motion to dismiss was filed on May 23, 2000, and is reprinted at Appendix B.

The United States District Court of the Central District of California's unreported memorandum order granting the County of Los Angeles' motion to dismiss was filed on May 26, 2000, and is reprinted at Appendix C.

JURISDICTION

Petitioners and defendants Chandra Spencer ("Ms. Spencer"), Franscell, Strickland, Roberts & Lawrence ("Franscell firm") and the County of Los Angeles ("County") respectfully pray that a writ of certiorari issue

[1] The order by the Ninth Circuit granting the request for publication was filed on July 18, 2003 and is reprinted at Appendix D. The order by the Ninth Circuit denying petitioners' motion to recall the mandate and request for extension of time to file a petition for rehearing and suggestion for rehearing en banc was filed on July 30, 2003 and is reprinted at Appendix E.

to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, initially entered on May 13, 2003 as a memorandum disposition and subsequently ordered published and redesignated as a per curiam opinion on July 18, 2003. (App. A1, D.)

On July 30, 2003, the Ninth Circuit denied petitioners' motion to recall the mandate (issued on June 17, 2003) and request for an extension of time to file a petition for rehearing and suggestion for rehearing en banc. (App. E.)

The petition is filed within 90 days of the entry of the judgment pursuant to U.S. Supreme Court Rule 13.1. The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL/STATUTORY PROVISIONS

The following statutory and constitutional provisions relevant to this petition are set forth in the Appendices as follows:

1. 42 U.S.C. § 1983 at Appendix F
2. California Welfare and Institutions Code § 827(a)(1) at Appendix G
3. California Rule of Court 1423(b) at Appendix H

STATEMENT OF THE CASE

Respondent and plaintiff Raul Gonzalez, Jr. ("Gonzalez") sued Ms. Spencer, the Franscell firm and the County (collectively "petitioners") alleging that his constitutional

right of privacy was violated when the County shared its juvenile court records regarding Gonzalez with Ms. Spencer during a previously filed lawsuit brought by Gonzalez against the County and a juvenile court clerk, among others. Ms. Spencer was an associate of the Franscell firm who had been retained by the County to represent all defendants in the underlying civil rights lawsuit arising from Gonzalez's arrest based on an outstanding juvenile court warrant which Gonzalez alleged should have been recalled. During the course of the underlying action, Ms. Spencer accessed Gonzalez's juvenile court records from her client and used the information contained therein to question Gonzalez during his deposition. (App. A2, B3.) After Gonzalez unsuccessfully moved to disqualify Ms. Spencer in the underlying action on the grounds that she wrongfully seized and used his juvenile court records, he filed this subsequent civil rights action.[2]

The district court granted the motions to dismiss the complaint filed by Ms. Spencer, the Franscell firm and the County with prejudice based on its prior finding in the underlying case that Gonzalez's juvenile court records were subject to disclosure "because they contained evidence of substantial relevance to issues raised by Gonzalez in the underlying action." (App. B3-4, C3.)

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[2] The district court denied Gonzalez's motion to disqualify after holding an in-camera proceeding consistent with California's statutory scheme for the disclosure of juvenile court files and after balancing Gonzalez's right of privacy with the rights of the defendants to due process and effective assistance of counsel in the underlying case. (App. B3-4, C3-4.)

On appeal, a two-judge majority of the Ninth Circuit Court of Appeals reversed the district court's dismissal of the claims for damages, holding that Gonzalez could assert a 42 U.S.C. § 1983 claim for violation of his constitutional right to privacy because the County shared its juvenile records regarding Gonzalez with its counsel in violation of state law. (App. A2.) The court of appeals also determined that even though the district court could have ordered disclosure, "neither the juvenile court nor its personnel were entitled to share Gonzalez's case file with counsel simply to protect their own pecuniary interests." (App. A3.)

The court of appeals further found that Ms. Spencer acted under color of state law for purposes of liability under section 1983 simply because she was "retained to represent state entities and their employees in litigation[,] . . . inspected Gonzalez's file in the course of that representation, and used her status to gain access to the file." (App. A3.) Finally, the court of appeals held that Ms. Spencer could not assert the defense of qualified immunity because she was a "private party, not a government employee." (App. A4.)

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S ERRONEOUS CONCLUSION THAT OUTSIDE COUNSEL IS A STATE ACTOR WHEN SHE DEFENDS A PUBLIC ENTITY IN A CIVIL MATTER CONFLICTS WITH PRECEDENTS OF THIS COURT AND DECISIONS OF THE OTHER CIRCUITS.

This Court's decisions, as well as the decisions in other circuits, have employed a variety of multi-factored tests to determine whether a private individual's conduct should be deemed state action for purposes of 42 U.S.C. § 1983. This Court has found, for example, state action when the challenged activity results from the State's exercise of "coercive power" (*Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777 (1982)), or when a private actor operates as a "willful participant in joint activity with the State or its agents" (*Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939, 102 S.Ct. 2744 (1982) (internal quotation marks omitted)), or when the private entity has been delegated a public function by the State (*West v. Atkins*, 487 U.S. 42, 56, 108 S.Ct. 2250 (1988)), or when it is "entwined with governmental policies," or when government is "entwined in [its] management or control" (*Evans v. Newton*, 382 U.S. 296, 299, 86 S.Ct. 486 (1966)).

This Court has long recognized that despite the many different tests employed to answer the inquiry, each court must address this issue on a case-by-case basis. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856 (1961); *Lugar*, 457 U.S. at 939 (this is a "necessarily fact-bound inquiry. . . . "). Indeed, this Court has grappled with diverse factual circumstances, as recently as *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 121 S.Ct. 924 (2001) and *American*

Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 119 S.Ct. 977 (1999), and acknowledged in *Lebron v. National RR Passenger Corp.,* 513 U.S. 374, 115 S.Ct. 961 (1995) that "[i]t is fair to say that 'our cases deciding when private action might be deemed that of the state have not been a model of consistency.'" *Id.* at 378.

The circuit courts have also described what constitutes state action as "an extremely difficult question," "murky waters," "obdurate," and a "protean concept," *Hack v. President & Fellows of Yale College*, 237 F.3d 81, 83 (2nd Cir. 2000); *Logiodice v. Trustees of Maine Central Institute*, 296 F.3d 22, 26 (1st Cir. 2002) (the state action "doctrines are too generally phrased to be self-executing: the cases are sensitive to fact situations and lack neat consistency."); *Robert S. v. Stetson School, Inc.*, 256 F.3d 159, 164 (3rd Cir. 2001) (quoting *Brentwood*); *DeBauche v. Trani*, 191 F.3d 499, 507 (4th Cir. 1999) (applied "principles elucidated and refined by the Supreme Court" in developing four-prong test to determine whether "a private party can be deemed to be a state actor"); *Montano v. Hedgepeth*, 120 F.3d 844, 848 (8th Cir. 1997) ("Resolving this question entails a journey down a particularly fact-bound path. . . . "); *Gallagher v. "Neil Young Freedom Concert"*, 49 F.3d 1442, 1447 (10th Cir. 1995) ("The Supreme Court has acknowledged that the determination as to whether particular conduct constitutes state action 'frequently admits of no easy answer.'"); *Rayburn v. Hogue*, 241 F.3d 1341, 1347 (11th Cir. 2001) (applying state compulsion test, public function test, and nexus/joint action test in state actor determination).

While it is clear that no one test or fact is determinative, these decisions universally hold that a fact intensive analysis is necessary to determine whether the conduct of

a private actor should be deemed as state action. Despite these decisions, the Ninth Circuit did not engage in the required analysis. Instead, the court concluded that an outside counsel is a state actor when she acts on behalf of the state's pecuniary interests. (App. A5.) Reliance on this single factor contravenes this Court's precedent and creates a conflict with the decisions of other circuits. Moreover, the analysis set forth in *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445 (1981) provides no support for the proposition that a public entity's private counsel is a state actor simply because she has been retained to protect the pecuniary interests of the entity and its employees in the defense of a lawsuit. On the contrary, this Court in *Polk* held that a public defender does not act "under color of state law" in performing a lawyer's traditional functions as counsel to an indigent defendant in a state criminal proceeding.

Therefore, review is warranted under subparts (a) and (c) of Rule 10.

II. THE NINTH CIRCUIT'S DECISION BARRING OUTSIDE COUNSEL FOR PUBLIC ENTITIES FROM ASSERTING THE DEFENSE OF QUALIFIED IMMUNITY IS CONTRARY TO THIS COURT'S OPINION IN *RICHARDSON V. MCKNIGHT* AND THE DECISIONS OF SEVERAL CIRCUIT COURTS.

Qualified immunity is a defense employed by government officials against suits under section 1983 for violations of civil rights. *Saucier v. Katz,* 533 U.S. 194, 200-01, 121 S.Ct. 2151 (2001). This Court has on occasion addressed the important issue of when non-government officials who have been deemed state actors for purposes of

section 1983 may also assert the qualified immunity defense.

In *Wyatt v. Cole*, 504 U.S. 158, 112 S.Ct. 1827 (1992), this Court addressed the "conflict among the Courts of Appeals over whether private defendants threatened with section 1983 liability are, like certain government officials, entitled to qualified immunity from suit," holding that the immunity did not extend to those who invoked state replevin, garnishment or attachment statutes. *Id.* at 161, 168-69.

In *Richardson v. McKnight*, 521 U.S. 399, 117 S.Ct. 2100 (1997), this Court held that prison guards who were employees of a private prison management firm could not invoke qualified immunity. The Court instructed that when making a determination of the entitlement to qualified immunity, courts must "look both to history and to the purposes that underlie government employee immunity in order to find the answer." *Id.* at 404; *Wyatt* at 164. Specifically, this Court conducted a thorough analysis as to whether there existed a "firmly rooted" tradition of immunity applicable to privately employed prison guards. *Id.* at 404-07. The Court next examined whether the doctrine's purposes warranted the entitlement to the defense under the circumstances. *Id.* at 407-12. These purposes included "protecting the government's ability to perform its traditional functions by providing immunity where necessary to preserve the ability of government officials to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service." *Id.* at 408.

Here, the court of appeals announced a blanket rule that outside counsel who defend public entities and their

employees in civil litigation are precluded from asserting the defense of qualified immunity:

> "Spencer is not entitled to qualified immunity. She is a private party, not a government employee, and she has pointed to 'no special reasons significantly favoring an extension of governmental immunity' to private parties in her position. *See Richardson* v. *McKnight*, 521 U.S. 399, 412 (1997)." (App. A6.)

This represents the entirety of the court of appeals' analysis on this important federal issue. Obviously, the decision of the divided court of appeals panel does not comport with the thorough analysis required under *Richardson*, warranting review by this Court under Rule 10(c). Furthermore, review by this Court is warranted under Rule 10(a) because the Ninth Circuit's majority decision is in direct conflict with a decision of the Sixth Circuit.

In *Cullinan v. Abramson*, 128 F.3d 301 (6th Cir. 1997), the plaintiffs filed a section 1983 civil rights action against the City of Louisville, various City officials, and the City's in-house and outside counsel. The suit challenged actions by the City and its employees and counsel in earlier litigation. *Id.* at 305-06. The district court denied the defendants' motion to dismiss plaintiffs' claims on the grounds of qualified immunity, and an interlocutory appeal was taken. In addressing the question of whether the outside counsel were eligible for qualified immunity, the Sixth Circuit examined the history and purposes of the qualified immunity doctrine, in accordance with *Richardson* and earlier Sixth Circuit precedent. *Id.* at 310. With respect to the history of the doctrine, the Sixth Circuit concurred with the observation by this Court in *Richardson*

that the common law "'*did* provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign.'" *Id.* (emphasis in original).

The Sixth Circuit further found that the important purposes of qualified immunity were advanced by application of the doctrine to claims against both in-house and outside counsel:

> "As attorneys for the city, [the outside counsel] were clearly acting as the city's agents. The rationales for qualified immunity apply to these lawyers and their firm in about the same way they apply to . . . Louisville's sometime law director. We see no good reason to hold the city's in-house counsel eligible for qualified immunity and not the city's outside counsel."

Cullinan, 128 F.3d at 310. Needless to say, the Ninth Circuit's majority decision in the instant case – broadly declaring that a public entity's privately retained counsel are state actors but cannot assert the qualified immunity defense – cannot be reconciled with the Sixth Circuit's holding in *Cullinan*.

Review under Rule 10(a) is further warranted because the Ninth Circuit's ruling is also in conflict with various other circuit courts which have faithfully employed the *Richardson* analysis. *See*, *e.g.*, *Hinson v. Edmond, M.D.*, 192 F.3d 1342 (11th Cir. 1999) (following *Richardson* analysis in addressing a privately employed prison physician's entitlement to qualified immunity); *Payton v. Rush-Presbyterian-St. Luke's Medical Center*, 184 F.3d 623, 631 (7th Cir. 1999) (*Richardson* analysis must be applied to determine whether medical center's security officers are

entitled to qualified immunity); *Toussie v. Powell*, 323 F.3d 178, 183-84 (2nd Cir. 2003) (applying *Richardson* analysis to assertion of qualified immunity by political party chairman).

Finally, review by this Court is necessary in light of the national importance of this issue. It is well-known that public entities often become embroiled in civil litigation regarding various subjects, such as civil rights, child welfare, land use, employment and intellectual property, among a variety of other subjects. Many such entities, especially in small jurisdictions, do not retain in-house counsel, for numerous reasons, such as that the expense is prohibitive or that because disputes involving certain legal specialties arise too infrequently. Thus, they oftentimes rely upon private civil defense counsel.

Under the Ninth Circuit's broad holding (which is binding upon no less than nine western states), those counsel will be deemed state actors but, without the benefit of qualified immunity as an available defense. This sudden and drastic change in the law may deprive public entities and their employees from obtaining qualified counsel, especially in light of the fact that said counsel may not be able to off-set this new threat of exposure via insurance (since it may be against state law to insure against intentional torts, such as civil rights violations). The result is that such competent counsel will either leave the marketplace or increase their rates beyond that affordable for a governmental entity. Thus, the public policies favoring attorney/client relationships, as well as conserving public resources, justify review of the Ninth Circuit's decision on this important matter.

III. THE NINTH CIRCUIT'S RULING THAT GONZALEZ'S CONSTITUTIONAL PRIVACY RIGHTS WERE VIOLATED IS IN CONFLICT WITH THE DECISIONS OF AT LEAST THREE OTHER CIRCUIT COURTS.

This Court in *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869 (1977), identified two legal principles regarding the constitutional right to privacy. The first principle protects an individual's right to make certain personal choices. This principle, for example, underscored this Court's rationale in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973). The second principle, and the one at issue in the present case, protects an individual's right to control the nature and extent of information released about that individual. *See Whalen*, 429 U.S. at 599-600; *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 457, 97 S.Ct. 2777 (1977) (noting that the right to privacy includes an "'individual interest in avoiding disclosure of personal matters'") (quoting *Whalen*, 429 U.S. at 599).

Whether the Constitution in fact protects against the type of disclosure alleged to have occurred here depends upon whether Gonzalez had a reasonable expectation of privacy in the information. *Nixon*, 433 U.S. at 458. These "personal rights found in the guarantee of personal privacy must be limited to those which are 'fundamental' or 'implicit in the concept of ordered liberty.'" *Paul v. Davis*, 424 U.S. 693, 713, 96 S.Ct. 1155 (1976).

Since *Whalen* and *Nixon*, the circuits have differed dramatically in the interpretation of an individual's constitutionally protected privacy rights, creating a clear conflict in law which should be addressed by this Court. The Sixth, Eighth and Tenth Circuits have narrowly construed the holdings of *Whalen* and *Nixon* to limit an

individual's privacy rights to interests that implicate a fundamental liberty interest. In *J.P. v. DeSanti*, 653 F.2d 1080 (6th Cir. 1981), a juvenile who had been convicted of a crime brought a section 1983 action arising from the release of personal information to governmental, social, and religious agencies contending that such disclosures were in violation of Ohio state law. *Id.* at 1082. In rejecting plaintiff's claims, the Sixth Circuit held that no general right to privacy provided wholesale protection against the dissemination of personal information. *Id.* at 1090. Furthermore, relying on this Court's decision in *Paul v. Davis*, the Sixth Circuit also held that a balancing test should be employed only if fundamental or traditional rights are implicated. *DeSanti*, 653 F.2d at 1090-91; *see Cline v. Rogers*, 87 F.3d 176, 179 (6th Cir. 1996) (holding that there is no constitutional right to privacy in one's criminal record).

In *Eagle v. Morgan*, 88 F.3d 620 (8th Cir. 1996), a city auditor brought a civil rights action against certain police officers and the city, alleging that his privacy rights were infringed when information about his felony conviction, obtained in violation of state law, was disclosed during a city council meeting. *Id.* at 622-23. The Eighth Circuit held that to "violate a person's constitutional right of privacy the information disclosed must be either a shocking degradation or an egregious humiliation of her to further some specific state interest, or a flagrant breach of a pledge of confidentiality which was instrumental in obtaining the personal information." *Id.* at 625, citing *Alexander v. Peffer*, 993 F.2d 1348, 1350 (8th Cir. 1993) (internal quotations and brackets omitted). Accordingly, in *Cooksey v. Boyer*, 289 F.3d 513 (2002), the Eighth Circuit held that the disclosure of a police chief's psychological

record by the mayor did not violate his constitutional right to privacy under the Fourteenth Amendment.

Similarly, in *Nilson v. Layton City*, 45 F.3d 369 (1995) the Tenth Circuit held:

> "Substantive due process rights are founded not upon state law but upon deeply rooted notions of fundamental personal interests derived from the Constitution. While state statutes and regulations may inform our judgment regarding the scope of constitutional rights, they fall short of the kind of proof necessary to establish a reasonable expectation of privacy. Mere allegations that an official failed to abide by state law will not suffice to state a constitutional claim. The disclosed information itself must warrant constitutional protection."

Id. at 377 (internal quotations and brackets omitted).

The Ninth Circuit's holding in this case that the violation of a state statute alone suffices to establish a constitutional claim for invasion of privacy cannot be reconciled with decisions of the Sixth, Eighth and Tenth Circuits.[3] Even assuming that petitioners violated California law, such violation, in and of itself, does not rise to the level of a constitutional invasion of privacy.[4]

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[3] Courts in the Second Circuit have held that the disclosure of juvenile court information in violation of state law to be sufficient to establish a constitutional claim for invasion of privacy (*e.g.*, *Soucie v. County of Monroe*, 736 F.Supp. 33 (W.D.N.Y. 1990)).

[4] To the extent that the Ninth Circuit held that a violation of state law can serve as the basis of a constitutional claim, it contravenes California law. *See Rosales v. City of Los Angeles*, 82 Cal.App.4th 419,

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Therefore, the petition for certiorari should be granted by this Court under Rule 10(a) to settle a conflict the Ninth Circuit's majority opinion has created with decisions of the Sixth, Eighth and Tenth Circuits on the same important matter.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Raul Gonzalez, Jr.,

Plaintiff-Appellant,

v.

Chandra Spencer; Franscell, Strickland, Roberts & Lawrence, a Professional Corporation; Los Angeles County,

Defendants-Appellees.

No. 00-55935

D.C. No. CV-00-01944-WJR

OPINION

Appeal from the United States District Court
for the Central District of California
William J. Rea, District Judge, Presiding

Argued and Submitted
November 6, 2001 – Pasadena, California

Filed May 13, 2003

Before: Cynthia Holcomb Hall, Alex Kozinski and William A. Fletcher, Circuit Judges.

Per Curiam Opinion;
Dissent by Judge W. Fletcher

COUNSEL

Robert Mann, Los Angeles, California, argued for the plaintiff-appellant. Donald W. Cook, Los Angeles, California, joined him on the briefs.

Cindy S. Lee, Franscell, Strickland, Roberts & Lawrence, Pasadena, California, argued for defendants-appellees

Chandra Spencer and Franscell, Strickland, Roberts & Lawrence.

Jennifer E. Gysler, Monroy, Averbuck & Gysler, Westlake Village, California, argued for defendant-appellee County of Los Angeles. Clayton C. Averbuck, Monroy, Averbuck & Gysler, Westlake Village, California, joined her on the brief.

OPINION

PER CURIAM:

While defending Los Angeles County in a civil rights suit brought by Raul Gonzalez (the "underlying action"), attorney Chandra Spencer accessed Gonzalez's juvenile court file without notifying him and without obtaining authorization from the juvenile court pursuant to California Welfare & Institutions Code § 827(a)(1)(M) and California Rule of Court 1423(b). Spencer used confidential records from the file to cross-examine Gonzalez during his deposition in the underlying action. Gonzalez then brought this suit against Spencer, her firm, Franscell, Strickland, Roberts & Lawrence, and the county for accessing and using his juvenile court file without authorization. He alleged that Spencer's conduct violated his rights under the Fourth and Fourteenth Amendments and California law. The district court dismissed his claims for damages and for declaratory and injunctive relief.

1. Appellees argue that settlement of the underlying action rendered this case moot because Gonzalez no longer faces a significant prospect of illegal inspection or disclosure. "A case is moot only if interim events have 'completely and irrevocably eradicated the effects of' an allegedly

improper ruling." *In re Pintlar Corp.,* 124 F.3d 1310, 1312 (9th Cir. 1997) (quoting *Wong* v. *Dep't of State,* 789 F.2d 1380, 1384 (9th Cir. 1986)). Although Gonzalez need not fear similar injury in the future, the settlement does not affect his claims for damages based on past conduct.

2. Spencer acted under color of state law. She was retained to represent state entities and their employees in litigation. She inspected Gonzalez's file in the course of that representation, and used her status to gain access to the file. Her role was analogous to that of a state prosecutor rather than a public defender, because she acted on behalf of the state rather than as its adversary. *See Polk County* v. *Dodson,* 454 U.S. 312, 323 n.13 (1981).

Spencer was not "[c]ourt personnel" for purposes of section 827(a)(1)(A). She was not a court employee and did not perform functions routinely performed by court employees. Rather, she was an outside service provider retained to represent the court with respect to its pecuniary interests. *Michael* v. *Gates,* 38 Cal. App. 4th 737 (Ct. App. 1995), is not on point. One of the statutes at issue there, California Evidence Code section 1043, placed rights to LAPD personnel files in the LAPD as an institution. The privilege to the files belonged to the LAPD itself as well as the individual officers. *See Michael,* 38 Cal. App. 4th at 744. By contrast, neither the juvenile court nor its personnel were entitled to share Gonzalez's case file with counsel simply to protect their own pecuniary interests.

Spencer therefore had to get court permission before inspecting Gonzalez's file. State law required her to petition the juvenile court. *See* Cal. Welf. & Inst. Code § 827(a)(1)(M); Cal. Rules of Court 1423(b). Although the district court could have ordered disclosure notwithstanding

state law, the file was still presumptively protected until it did. *See* 23 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5428, at 817 (1980) ("[E]ven in cases where federal law applies, constitutional and prudential considerations suggest that courts should carefully assess any attempt to compel disclosure of confidential juvenile court [files]."). Spencer could not inspect the file on her own initiative on the theory that she could have obtained permission, had she asked. *Cf. United States* v. *Echegoyen,* 799 F.2d 1271, 1280 n.7 (9th Cir. 1986) ("[T]o excuse the failure to obtain a warrant merely because the officers had probable cause and could have . . . obtained a warrant would completely obviate the warrant requirement . . . ."). Nor could the district court authorize her search retroactively. If Spencer violated Gonzalez's constitutional rights, he is entitled at least to nominal damages, even if Spencer could have obtained the documents lawfully. *See Wilks* v. *Reyes,* 5 F.3d 412, 416 (9th Cir. 1993).

Because Spencer improperly obtained access to Gonzalez's juvenile court file, we need not reach the question whether Spencer's use of Gonzalez's file in depositions also violated his constitutional rights.

3. Spencer is not entitled to qualified immunity. She is a private party, not a government employee, and she has pointed to "no special reasons significantly favoring an extension of governmental immunity" to private parties in her position. *See Richardson* v. *McKnight,* 521 U.S. 399, 412 (1997).

Gonzalez's claims were not estopped or waived by his mere pursuit of the underlying action or his failure to object immediately when Spencer first disclosed the file.

He did not take "inconsistent positions" with respect to the file's confidentiality, *Rissetto* v. *Plumbers & Steamfitters Local 343,* 94 F.3d 597, 601 (9th Cir. 1996) (internal quotation marks omitted), nor did he voluntarily "relinquish[ ] . . . a known right," *Yoshida* v. *Liberty Mut. Ins. Co.,* 240 F.2d 824, 829 (9th Cir. 1957).

* * *

The district court's dismissal of the damages claims is reversed. The injunctive claims are dismissed as moot. The case is remanded for further proceedings consistent with this opinion.

REVERSED in part, DISMISSED in part and REMANDED. Costs to appellant.

W. A. FLETCHER, dissenting.

I respectfully dissent. Gonzalez contends that Spencer's access to and use of his juvenile court case file constituted a violation of the Fourth Amendment. A person claiming a right to privacy under the Fourth Amendment must demonstrate a "justifiable," "reasonable" or "legitimate expectation of privacy." *Smith v. Maryland,* 442 U.S. 735, 739 (1979) (internal quotations omitted); *see Kee v. City of Rowlett,* 247 F.3d 206, 211-12 (5th Cir. 2001) (applying Fourth Amendment analysis to a § 1983 suit alleging a violation of the constitutional right to privacy). Gonzalez bases his Fourth Amendment claim on California law, which, he contends, forbade Spencer from gaining access to and using his juvenile court case file without first seeking authorization from the California juvenile court.

Specifically, Gonzalez contends that California Welfare and Institutions Code § 827 and California Rule of Court 1423 required Spencer to petition the juvenile court in order to obtain access to his file. He asserts that § 827 establishes that juvenile court case files are confidential, and that Rule 1423 provides that inspection of files by persons other than those specified in § 827 can be authorized only by the juvenile court. I agree with Gonzalez that § 827 establishes the confidentiality of juvenile court case files. I also agree that Rule 1423 requires that the juvenile court authorize access to those files by parties within the contemplation of § 827, and that Rule 1423 restricts the ways in which files can be used. However, I disagree with Gonzalez (and the majority) as to the status of Spencer and her law firm, and as to the access and use that are permitted. I would hold that because Spencer and her firm represented the juvenile court in connection with the § 1983 case brought by Gonzalez, and because Spencer obtained and used Gonzalez's juvenile court case file only in depositions of a court employee and Gonzalez himself in connection with that representation, Spencer did not violate § 827 or Rule 1423.

Section 827(a)(1)(A) provides, "[A] [juvenile] case file may be inspected only by the following: (A) Court personnel." Section 827(a)(2) provides, in pertinent part, "[J]uvenile case files . . . shall be released to the public pursuant to an order by the juvenile court after a petition has been filed and interested parties have been afforded an opportunity to file an objection." I read § 827(a)(1)(A) to allow "court personnel," including a retained attorney representing the juvenile court in litigation, to "inspect" a juvenile court case file of a plaintiff in that litigation without the necessity of first filing a petition with a judge

of the juvenile court. Further, I do not read § 827(a)(2), which requires a petition if a juvenile court case file is to be "released to the public," to require a petition when the file is to be used in depositions of a court employee and of the plaintiff.

Rule 1423(b) provides, in pertinent part:

> Only those persons specified in sections 827 and 828 may inspect juvenile court records without authorization from the court . . . .
>
> . . . The court shall permit disclosure of, discovery of, or access to juvenile court records or proceedings only insofar as is necessary, and only if there is a reasonable likelihood that the records in question will disclose information or evidence of substantial relevance to the pending litigation, investigation, or prosecution.

I do not read Rule 1423 to require prior judicial authorization of Spencer's access to Gonzalez's juvenile court case file because I read the reference to "court personnel" in § 827(a)(1)(A) to include Spencer. In the words of Rule 1423, Spencer is a "person[ ] specified in section 827" who "may inspect juvenile court records without authorization from the court." Further, I do not read Rule 1423 to require prior judicial authorization when Spencer's use of information from the file was limited to the two depositions in this case.

I am assisted in my reading of § 827 and Rule 1423 by *Michael v. Gates,* 38 Cal. App. 4th 737 (1995), in which a California Court of Appeal interpreted analogous provisions of California law governing confidentiality of police personnel records. Michael was a former Los Angeles police officer who had testified as an expert witness in an

earlier suit brought against the Los Angeles Police Department. During the course of that litigation, a police officer reviewed Michael's Police Department personnel records in an attempt to find information that could be used to impeach Michael at trial, and turned the records over to the deputy city attorney who was representing the Department. Neither the police officer nor the attorney notified Michael that they were reviewing his Department personnel records, and neither obtained judicial authorization for their review. When the Department's attorney announced that he intended to use information from Michael's personnel records to impeach him, Michael's counsel objected. The court sustained the objection and ordered the records sealed. Michael then brought a separate civil suit alleging a violation of the California statutes providing for the confidentiality of Department personnel records.

The relevant statutes in *Michael* were California Penal Code § 832.7 and Evidence Code § 1043. Welfare and Institutions Code § 827, at issue in our case, provides that juvenile court case files are confidential. Penal Code § 832.7, at issue in *Michael,* similarly provides that police officer personnel records are confidential. Specifically, § 832.7(a) provides, "Peace officer personnel records . . . are confidential and shall not be disclosed by the department or agency that employs the peace officer in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code."

California Rule of Court 1423, at issue in our case, requires prior judicial authorization for disclosure of, discovery of, or access to juvenile court records, except as to certain categories of people. Evidence Code § 1043, at issue in *Michael,* similarly requires prior judicial or

administrative authorization for discovery or disclosure of police officer personnel records. Specifically, § 1043 provides, in pertinent part:

> (a) In any case in which discovery or disclosure is sought of peace officer personnel records . . ., the party seeking the disclosure shall file a written motion with the appropriate court or administrative body . . . .
>
> (b) The motion shall include . . . [a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation . . . .

Unlike § 827 and Rule 1423, at issue in our case, the statutes at issue in *Michael* contain no language excusing anyone from their requirements. Insofar as the texts of Penal Code § 832.7 and Evidence Code § 1043 provide, all people (without exception) who seek access to confidential police personnel records are required to seek prior judicial or administrative authorization. The court in *Michael* nonetheless held that the attorney had violated neither § 832.7 nor § 1043. The court held that, on the facts of the case, there had been no " 'discovery or disclosure' of [Michael's] records within the meaning of the statutes":

> An agency which reviews its own records *with its attorney* has not engaged in discovery.
>
> . . . [R]ather than forbidding a governmental agency which has custody and control of peace officer personnel records from reviewing those records *with its attorney,* the [statutory] scheme contemplates, even demands, that a governmental agency *and its lawyer* will review those records, without noticed motion or court order.

Id. at 38 Cal. App. 4th at 743-44 (italics added; underlining in original). The court held, further, that an inspection of the records by an attorney, for the purpose of defending the agency in litigation, does not constitute disclosure:

> [W]e hold that where, as here, a governmental agency *and its attorney* conduct a contained and limited review of peace officer personnel files within the custody and control of the agency, for some relevant purpose, there is no disclosure under the statutes.

Id. at 745 (emphasis added).

In the analogous context of our case, I conclude that a California court would find that an attorney representing the juvenile court in litigation may obtain access to juvenile court files of a plaintiff in that litigation. Even if § 827 did not contain explicit authorization for "court personnel" to obtain access to court files relevant to litigation in which the court is involved, I would read *Michael* to authorize such access. In fact, however, § 827 goes beyond the statutory silence in *Michael* and explicitly authorizes access by "court personnel." Informed by *Michael,* I construe the term "court personnel" in § 827(a)(1)(A) to include an attorney representing the court. That is, if an attorney had authority to examine confidential records in *Michael,* where there was no statutory provision providing for such an examination, I believe that a California court would find that an attorney has similar authority here, where there is an explicit statutory provision giving "court personnel" an unrestricted right to "inspect" a juvenile court case file.

The next question is whether an attorney representing the juvenile court may use juvenile court case files in

depositions, without first obtaining authorization from a judge of that court. The answer is not provided by *Michael*. In that case, the personnel records were reviewed by the attorney in preparation for cross-examination, but, in the end, they were not used for that purpose. Indeed, the court in *Michael* was careful to specify that the records had not been "disclose[d] in litigation." 38 Cal. App. 4th at 744.

I would hold that § 827 and Rule 1423 were not violated in this case, where information from Gonzalez's juvenile court case file was used only in depositions of a court employee and of Gonzalez himself. The clear concern of § 827 and Rule 1423 is that confidential information contained in a juvenile court case file not be released to the general public unless there has been authorization by a judge of the juvenile court. Indeed, § 827(a)(2) is explicit on this point: "[J]uvenile case files . . . shall be released *to the public* pursuant to an order by the juvenile court after a petition has been filed and interested parties have been afforded an opportunity to file an objection." (Emphasis added.) *See also* Rule 1423(b) ("In determining whether to authorize inspection or release of juvenile court records, in whole or in part, the court shall balance the interests of the child and other parties to the juvenile court proceedings, the interests of the petitioner, and the interests of *the public*." (emphasis added)).

In this case, the only release of information from Gonzalez's juvenile court case files took place during the two depositions conducted in connection with Gonzalez's § 1983 case, and there is no allegation that Spencer revealed information from the files more broadly than to those who participated in the depositions. The first deponent was a court employee, who, as "court personnel" under § 827(a)(1)(A), is entitled to "inspect" the file. The

other deponent was Gonzalez himself, who can hardly be considered a member of the public for purposes of § 827 and Rule 1423.

There is really not much to Gonzalez's case. The sum total is that Spencer gained access to his juvenile court file while representing the juvenile court in the course of defending against a suit brought by Gonzalez, and that Spencer used information from the file in deposing a court employee and Gonzalez. I would hold that, in those circumstances, Spencer violated neither § 827 nor Rule 1423. Because Spencer violated neither § 827 nor Rule 1423, she could not have violated any federal constitutional right of privacy based on a settled expectation arising out of state law. I would therefore affirm the district court's dismissal of Gonzalez's § 1983 suit.

APPENDIX B

LODGED

DAVID D. LAWRENCE, Bar No. 123039
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Attorneys for Defendants Chandra Spencer
and Franscell, Strickland, Roberts & Lawrence

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RAUL GONZALEZ, JR., Plaintiff, vs. CHANDRA SPENCER, FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE, A Professional Corporation, COUNTY OF LOS ANGELES, and DOES 1 through 10, individually, Defendants.	Case No. CV 00-01944 WJR (Ex) Judge William J. Rea ~~[Proposed]~~ ORDER ON MOTION TO DISMISS BY CHANDRA SPENCER AND FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE (Filed May 23, 2000)

The Motion to Dismiss by Defendants Chandra Spencer and Franscell, Strickland, Roberts & Lawrence came on regularly for hearing before this court on April 10, 2000. Robert Mann appeared on behalf of Plaintiffs, Chandra Spencer appeared on behalf of Defendants

Chandra Spencer and Franscell, Strickland, Roberts & Lawrence and Clayton Averbuck appeared on behalf of Defendant County of Los Angeles.

After consideration of the papers and argument presented, IT IS HEREBY ORDERED that the motion is granted and this action against Chandra Spencer and Franscell, Strickland, Roberts & Lawrence is dismissed in its entirety with prejudice. A copy of the court's tentative ruling, which is adopted by the court, is attached hereto as Exhibit A.

DATED: 05-23-2000

WILLIAM J. REA
William J. Rea
United States District Judge

Presented by:
FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE

BY: Chandra Gehri Spencer
Chandra Gehri Spencer
Attorneys for Defendants
Chandra Spencer and Franscell, Strickland, Roberts & Lawrence

---

EXHIBIT A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TENTATIVE RULING

Case Number: CV 00-1944 WJR (Ex) Docket Number: ___

Title: *Gonzalez v. Spencer, Franscell, Strickland, Roberts & Lawrence, and County of Los Angeles*

Date: Monday, April 10, 2000

Nature of Motion: Motion of Defendants Spencer and Franscell, Strickland, Roberts & Lawrence to Dismiss Gonzalez's Complaint

---

HON. WILLIAM J. REA, JUDGE

Marva Dillard, Deputy Clerk

TENTATIVE RULING

Defendants Spencer and Franscell, Strickland, Roberts & Lawrence move this Court to dismiss Gonzalez's complaint. Gonzalez's complaint alleges ten causes of action under federal and state law relating to Defendants' alleged unlawful seizure and misuse of Gonzalez's juvenile court records.

In the underlying civil rights action, Gonzalez moved to disqualify Spencer on the same grounds, namely that she wrongfully seized Gonzalez's juvenile court records and used information contained therein to question Gonzalez during his deposition. The Court declined to disqualify Spencer due to the substantial hardship to the defendants in that case that would likely ensue. Instead, the Court ordered the parties to attend an in camera proceeding to determine what juvenile court records the defendants were entitled to. The Court reasoned that an in camera proceeding was consistent with California's statutory scheme for the disclosure of juvenile court files and would preserve Gonzalez's right of privacy without compromising the defendants' rights to due process and effective assistance of counsel.

After reviewing the documents in Spencer's possession, the Court found that the documents were subject to

disclosure because they contained evidence of substantial relevance to issues raised by Gonzalez in the underlying action. Accordingly, the Court declined to order Spencer to turn over the documents and declined to order the transcript of Gonzalez's deposition sealed. The Court also found that any potential breach of Gonzalez's right of confidentiality as to his juvenile court records had been adequately remedied by the in camera proceeding conducted before the Court.

Given the circumstances of the underlying action, the Court is inclined to dismiss this case in its entirety. Such dismissal is with prejudice.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, Debra L. Ard, am employed in the aforesaid County, State of California; I am over the age of 18 years and not a party to the within action; my business address is 225 South Lake Avenue, Penthouse, Pasadena, CA 91101-3005.

On May 25, 2000, I served the foregoing **ORDER ON MOTION TO DISMISS BY CHANDRA SPENCER AND FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE** on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

Robert Mann
Donald W. Cook
3435 Wilshire Blvd., Suite 2900
Los Angeles, CA 90010

Clayton C. Averbuck
Monroy, Averbuck & Gysler
32107 Lindero Canyon Rd., Suite 231
Westlake Village, CA 91361

X BY MAIL: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Pasadena, California, in the ordinary course of business.

X (Federal) I declare under penalty of perjury that the foregoing is true and correct, and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on May 25, 2000, at Pasadena, California.

/s/ Debra L. Ard
Debra L. Ard

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RAUL GONZALEZ, JR., Plaintiff, vs. CHANDRA SPENCER; FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE, a Professional Corporation, COUNTY OF LOS ANGELES, Defendants.	Case No. CV 00-1944 WJR (JWJx) ORDER RE: MOTION TO DISMISS (Filed May 26, 2000)

Defendant COUNTY OF LOS ANGELES' Motion to Dismiss came on for hearing before this Court on May 8, 2000, before the Honorable William J. Rea, District Court Judge presiding. Robert Mann appeared on behalf of Plaintiff. Jennifer E. Gysler appeared on behalf of Defendant COUNTY OF LOS ANGELES.

After consideration of the briefs and arguments of counsel, and all other matters presented to the court, IT IS HEREBY ORDERED that the Motion to Dismiss on behalf of Defendant COUNTY OF LOS ANGELES is GRANTED with prejudice. Plaintiff's Complaint is dismissed for failure to state a claim upon which relief can be granted.

A copy of the tentative ruling, adopted by the Court, is attached hereto.

IT IS SO ORDERED.

DATED: May 25, 2000

/s/ William J. Rea
WILLIAM J. REA
United States
District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TENTATIVE RULING

Case Number: CV 00-1944 WJR (Ex)

Docket Number: ___

Title: Gonzalez v. Spencer.

Date: May 8, 2000

Nature of Motion: Motion to Dismiss

HON. WILLIAM J. REA, JUDGE

Marva Dillard, Deputy Clerk

TENTATIVE RULING

The Court is inclined to GRANT the Motion to Dismiss. The Court already dismissed similar claims against Spencer based upon the Court's findings that it was likely Gonzalez's juvenile court records contained evidence of substantial relevance to issues raised by Gonzalez in the underlying action and that any potential breach of Gonzalez's right of confidentiality as to those records was adequately remedied by the Court's in camera proceeding, which was consistent with California's statutory scheme

for the disclosure of juvenile records. The same reasoning applies to Gonzalez's claims against the County.

DISCUSSION

Defendant County of Los Angeles moves this Court to dismiss Gonzalez's Complaint. Gonzalez's Complaint alleges ten causes of action under federal and state law relating to Defendants' alleged unlawful seizure and misuse of Gonzalez's juvenile court records.

In the underlying civil rights action, Gonzalez moved to disqualify Spencer on the same grounds, namely that she wrongfully seized Gonzalez's juvenile court records and used information contained therein to question Gonzalez during his deposition. The Court declined to disqualify Spencer due to the substantial hardship to the defendants that would likely ensue. Instead, the Court ordered the parties to attend an in camera proceeding to determine what juvenile court records the defendants were entitled to. The Court reasoned that the in camera proceeding was consistent with California's statutory scheme for the disclosure of juvenile court files and would preserve Gonzalez's right of privacy without compromising the defendants' rights to due process and effective assistance of counsel.

After reviewing the documents in Spencer's possession, the Court found that the documents were subject to disclosure because they contained evidence of substantial relevance to issues raised by Gonzalez in the underlying action. Accordingly, the Court declined to order Spencer to turn over the documents and declined to order the transcript of Gonzalez's deposition sealed. The Court also found that any potential breach of Gonzalez's right of

confidentiality as to his juvenile court records had been adequately remedied by the in camera proceeding conducted before the Court.

On April 10, 2000, the Court granted the Motion to Dismiss of Chandra Spencer and the law firm Franscell, Strickland, Roberts & Lawrence. The Court found that dismissal was warranted given the circumstances of the underlying case. Since the Gonzalez's claims against the County of Los Angeles are based on the same operative facts, the same reasoning applies to Gonzalez's claims against the County of Los Angeles.

The only claim uniquely asserted against the County of Los Angeles is a taxpayer action under California Code of Civil Procedure § 526a. Section 526a authorizes a taxpayer to bring an action against officers of a state county, city, or town to restrain and prevent any illegal expenditure, waste of or injury to its public funds or public property. *See* C.C.P. § 526a.

In light of the Court's prior rulings, it appears that Gonzalez cannot allege facts that show that an official of the County of Los Angeles made an illegal expenditure or wasted public funds. Accordingly, the Court is inclined to grant the Motion to Dismiss with prejudice.

APPENDIX D

Not for Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAUL GONZALEZ, JR., Plaintiff-Appellant, v. **CHANDRA SPENCER; FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE,** a Professional Corporation; **LOS ANGELES COUNTY,** Defendants-Appellees.	No. 00-55935 D.C. No. CV-00-01944-WJR **ORDER** (Filed Jul. 18, 2003)

Before: **HALL, KOZINSKI** and **W. FLETCHER,** Circuit Judges.

The request for publication is GRANTED. The memorandum disposition filed on May 13, 2003, is redesignated a per curiam opinion.

APPENDIX E

Not for Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAUL GONZALEZ, JR.,

Plaintiff-Appellant,

v.

CHANDRA SPENCER; FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE, a Professional Corporation; LOS ANGELES COUNTY,

Defendants-Appellees.

No. 00-55935

D.C. No. CV-00-01944-WJR

ORDER

(Filed Jul. 30, 2003)

Before: **HALL, KOZINSKI** and **W. FLETCHER,** Circuit Judges.

Appellees' motion to recall the mandate and request for an extension of time to file a petition for rehearing and suggestion for rehearing en banc is DENIED.

APPENDIX F

UNITED STATES CODE ANNOTATED

TITLE 42

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

* * *

APPENDIX G

California Welfare and Institutions Code

§ 827. Juvenile case file inspection; confidentiality; release; probation reports; destruction of records; liability

(a)(1) Except as provided in Section 828, a case file may be inspected only by the following:

(A) Court personnel.

(B) The district attorney, a city attorney, or city prosecutor authorized to prosecute criminal or juvenile cases under state law.

(C) The minor who is the subject of the proceeding.

(D) His or her parents or guardian.

(E) The attorneys for the parties, and judges, referees, other hearing officers, probation officers and law enforcement officers who are actively participating in criminal or juvenile proceedings involving the minor.

(F) The superintendent or designee of the school district where the minor is enrolled or attending school.

(G) Members of the child protective agencies as defined in Section 11165.9 of the Penal Code.

(H) The State Department of Social Services to carry out its duties pursuant to Division 9 (commencing with Section 10000), and Part 5 (commencing with Section 7900) of Division 12 of the Family Code to oversee and monitor county child welfare agencies, children in foster care or receiving foster care assistance, and out-of-state placements.

(I) To authorized legal staff or special investigators who are peace officers who are employed by, or who are authorized representatives of, the State Department of Social Services, as necessary to the performance of their duties to inspect, license, and investigate community care facilities, and to ensure that the standards of care and services provided in those facilities are adequate and appropriate and to ascertain compliance with the rules and regulations to which the facilities are subject. The confidential information shall remain confidential except for purposes of inspection, licensing, or investigation pursuant to Chapter 3 (commencing with Section 1500) and Chapter 3.4 (commencing with Section 1596.70) of Division 2 of the Health and Safety Code, or a criminal, civil, or administrative proceeding in relation thereto. The confidential information may be used by the State Department of Social Services in a criminal, civil, or administrative proceeding. The confidential information shall be available only to the judge or hearing officer and to the parties to the case. Names that are confidential shall be listed in attachments separate to the general pleadings. The confidential information shall be sealed after the conclusion of the criminal, civil, or administrative hearings, and shall not subsequently be released except in accordance with this subdivision. If the confidential information does not result in a criminal, civil, or administrative proceeding, it shall be sealed after the State Department of Social Services decides that no further action will be taken in the matter of suspected licensing violations. Except as otherwise provided in this subdivision, confidential information in the possession of the State Department of Social Services shall not contain the name of the minor.

(J) Members of children's multidisciplinary teams, persons or agencies providing treatment or supervision of the minor.

(K) A judge, commissioner, or other hearing officer assigned to a family law case with issues concerning custody or visitation, or both, involving the minor, and the following persons, if actively participating in the family law case: a family court mediator assigned to a case involving the minor pursuant to Article 1 (commencing with Section 3160) of Chapter 11 of Part 2 of Division 8 of the Family Code, a * * * court-appointed evaluator or a person conducting a court-connected child custody evaluation, investigation, or assessment pursuant to Section 8118 of the Family Code, and counsel appointed for the minor in the family law case pursuant to Section 3150 of the Family Code. Prior to allowing counsel appointed for the minor in the family law case to inspect the file, the court clerk may require counsel to provide a certified copy of the court order appointing him or her as the minor's counsel.

(L) Juvenile justice commissions as established under Section 225. The confidentiality provisions of Section 10850 shall apply to a juvenile justice commission and its members.

Additions or changes indicated by underline; deletions by asterisks * * *

(M) Any other person who may be designated by court order of the judge of the juvenile court upon filing a petition.

* * *

APPENDIX H

California Rule of Court

Rule 1423. Confidentiality of records (§§ 827, 828)

* * *

(b) [Inspection] Only those persons specified in sections 827 and 828 may inspect juvenile court records without authorization from the court. Juvenile court records may not be obtained or inspected by civil or criminal subpoena. Authorization for any other person to inspect, obtain, or copy juvenile court records must be ordered by the juvenile court presiding judge or a judicial officer designated by the juvenile court presiding judge.

In determining whether to authorize inspection or release of juvenile court records, in whole or in part, the court shall balance the interests of the child and other parties to the juvenile court proceedings, the interests of the petitioner, and the interests of the public. The court shall permit disclosure of, discovery of, or access to juvenile court records or proceedings only insofar as is necessary, and only if there is a reasonable likelihood that the records in question will disclose information or evidence of substantial relevance to the pending litigation, investigation, or prosecution. The court may issue protective orders to accompany authorized disclosure, discovery, or access.

* * *

MOTION FILED

SEP 15 2003

(2)

No. 03-239

IN THE

Supreme Court of the United States

CHANDRA SPENCER; FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE, A Professional Corporation,
Petitioners,

vs.

RAUL GONZALES, JR.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONERS

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No. 03-239

In The
SUPREME COURT OF THE UNITED STATES

CHANDRA SPENCER; FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE, A Professional Corporation; COUNTY OF LOS ANGELES,
Petitioners,

vs.

RAUL GONZALEZ, JR.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

THE AMICI CURIAE

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

MOTION OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES TO FILE AMICUS CURIAE BRIEF

Pursuant to this Court's Rule 37.3(b), the California State Association of Counties ("CSAC") respectfully moves this Court for leave to file the attached Brief of Amicus Curiae in support of the Petitioners. A letter of consent from the Petitioners to the filing of this brief has been filed with the Clerk. However, Respondent's counsel has declined to give consent.

CSAC's specific interest in this case lies in its impact on California's 58 counties. The counties are a repository of vast amounts of confidential information. Not only juvenile court records like those at issue in the present case, but also medical records, mental health records, tax records, welfare agency records, law enforcement records, jail records and so on. All are protected from disclosure to one degree or another by statutes and regulations. And all become relevant at one time or another in litigation against counties. Questions invariably arise about the extent to which the counties may access these records, which they possess and control, in response to litigation and for administrative purposes.

The Ninth Circuit Court of Appeals decision holds that the Petitioner County of Los Angeles violated the Fourth Amendment prohibition against unreasonable searches and seizures and the Fourteenth Amendment right of privacy when it failed to follow proper procedures in accessing relevant juvenile court records in response to the juvenile Respondent's lawsuit against County and its juvenile court for damages. The implications are dramatic, since presumably

counties would also be liable for violating the Fourth and Fourteenth Amendments whenever they violate state statutes and rules that control the disclosure of the confidential records in their possessions. Such violations should not be condoned. However, for the reasons outlined in the accompanying brief, they do not rise to the level of a violation of the Fourth or Fourteenth Amendment.

September 12, 2003

Respectfully submitted,

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California State Association
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QUESTIONS PRESENTED

1. Does government violate a juvenile's Fourth Amendment rights when it accesses confidential juvenile court records about him without first obtaining a court order as required by state law?

2. Does government violate a juvenile's Fourth Amendment rights if the juvenile court records are discoverable in the juvenile's civil action against the government?

3. Under the above circumstances, does government violate a Fourteenth Amendment right to privacy by accessing juvenile court records without first obtaining a court order?

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INTEREST OF THE AMICUS CURIAE[1]

The Ninth Circuit's Memorandum Decision holds that a county violates a juvenile's Fourth and Fourteenth Amendment rights when it accesses confidential information about him without first obtaining a court order as required by state law. This decision federalizes a violation of state law. It has negative ramifications for counties, because they manage many categories of confidential information that include not only juvenile court records but also medical, mental health, welfare, tax and law enforcement records. Under the Ninth Circuit's decision, a misstep in accessing or disclosing any of these may transgress the Fourth and Fourteenth Amendments.

As discussed in this Amicus Brief, the Ninth Circuit's views are at variance with other Circuit Courts of Appeals and District Courts that have held that accessing or disclosing such records does not violate a juvenile's constitutional rights. The instant petition provides a vehicle for resolving this disparity.

INTRODUCTION

The Ninth Circuit Court of Appeals' Memorandum Decision holds that Petitioner Chandra Spencer, acting under color of state law on behalf of Petitioner County of Los Angeles, violated Respondent Raul Gonzalez' constitutional rights when she inspected the juvenile court's record containing information about him without first obtaining a court order as required by state law. The Ninth Circuit was not explicit about whether it viewed Petitioners' actions as the violation of a Fourth Amendment right to be free from unreasonable searches, a violation of a Fourteenth Amendment

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[1] This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

right to privacy, or both. However, as this brief demonstrates, the Ninth Circuit erred in ruling for the Respondent because the Petitioners transgressed neither the Fourth nor Fourteenth Amendment.

ARGUMENT

No Fourth Amendment Violation

The Ninth Circuit decision repeatedly refers to "Gonzalez's file" or "his file."[2] Of course, that is just a manner of speaking because the file is not "his," but the juvenile court's. It is "his file" only in the sense that it contains information about him. Thus, Petitioner Spencer's review of the juvenile court's file did not constitute a violation of the Fourth Amendment in the literal sense of a search of Respondent's person or private papers. As stated in *United States v. Miller,* with reference to Government's subpoena of bank records, "[on] their face, the documents subpoenaed here are not [the account holder's] 'private papers'" because the account holder can "assert neither ownership nor possession."[3] Precisely the same can be said of Respondent's juvenile court records.

As further stated in *United States v. Miller,*

> "This Court has repeatedly held that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government

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[2] *Gonzalez v. Spencer*, 336 F.3d 832, 835, 836 (9th Cir. 2003).

[3] *United States v. Miller,* 425 U.S. 434, 440 (1976).

> authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."[4]

Therefore, the Ninth Circuit erred when it implied, without discussion, that the Petitioners presumptively violated the Fourth Amendment when they accessed the *juvenile court's* file on Respondent.[5]

Of course, in *Katz v. United States*, this Court "departed from the narrow view" that "'property interests control the right of Government to search and seize,'"and that a "search and seizure become unreasonable when the Government's activities violate "the privacy upon which [a person] justifiably relie[s]."[6] In his concurring opinion, Justice Harlan distilled a two part test from earlier Fourth Amendment cases: "[F]irst that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[7] This has become the accepted standard.[8]

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[4] *United States v. Miller, supra*, 425 U.S. at 443, *citing United States v. White*, 401 U.S. 745, 751-752 (1971), *Hoffa v. United States*, 385 U.S. 293, 302 (1966), and *Lopez v. United States*, 373 U.S. 427 (1963).

[5] *Gonzalez v. Spencer, supra,* 336 F.3d at 835 (2003).

[6] *Katz. v United States*, 389 U.S. 347, 353 (1967).

[7] *Id.*, 389 U.S. at 361. (Harlan, J., concurring)

[8] *Kyllo v. United States,* 533 U.S. 27, 33 (2001).

Therefore the question is: Under the circumstances of this case, did California's protections against disclosure of juvenile court records create a reasonable expectation that they would not be disclosed to the Petitioners? The answer is "no," because in an underlying federal civil rights action, the Respondent had sued Petitioner County and its juvenile court for damages. The juvenile court possessed records about Respondent that were relevant to his claim against the County. On the basis of that relevance, the District Court in the underlying action held, after the Petitioners had already accessed the records and Respondent had moved to suppress them, that Petitioners were entitled to them pursuant to their discovery rights.[9]

The District Court's ruling in the underlying case followed the well-established principle, requiring little explanation, that a plaintiff's suit for damages may waive privileges or rights to privacy if the information is material to the defense. Thus, in a suit for personal injuries, a plaintiff must disclose otherwise privileged physician's records.[10] Similarly, in a suit for lost income plaintiff may be required to produce otherwise privileged state tax records;[11] and in cases of alleged governmental wrongdoing, the executive privilege may be circumscribed.[12] Conversely, a plaintiff may be able

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[9] App. B3-4, C3.

[10] *Palay v. Superior Court,* 18 Cal.App.4th 919, 22 Cal.Rptr.2d 839 (1993); *Slagle v. Superior Court,* 211 Cal.App.3d 1309, 260 Cal.Rptr. 122 (1989).

[11] *Wilson v. Superior Court,* 63 Cal.App.3d 825, 134 Cal.Rptr. 130 (1976).

[12] *United States v. Nixon,* 418 U.S. 683, 713 (1974).

to obtain the defendant's otherwise confidential bank records;[13] private personnel records;[14] and in the case of excessive force civil rights litigation, citizen complaints against the involved officer.[15]

The same logic applies to the discovery of information about Respondent in the juvenile court's file. California Welfare & Institutions Code section 827 generally limits access to court, school, law enforcement, child protection agency and other designated personnel.[16] However, the restriction of access is not absolute. Section 827(a)(1)(M) provides that a file may be inspected by "any other person who may be designated by court order of the judge of the juvenile court upon filing a petition." Thus, juvenile records are confidential,[17] but their confidentiality is not "absolute."[18]

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[13] *Hooser v. Superior Court*, 84 Cal.App.4th 997, 1004, 101 Cal.Rptr.2d 341, 346 (2000); *Moskowitz v. Superior Court*, 137 Cal.App.3d 313, 318, 187 Cal.Rptr. 4, 8 (1983).

[14] *Muskovitz v. Lubbers*, 182 Mich.App. 489, 498, 452 N.W. 2d 854, 858 (1990); *Board of Trustees v. Superior Court*, 119 Cal.App.3d 516, 533, 174 Cal.Rptr.160, 169 (1981).

[15] California Evidence Code section 1043; *Rosales v. City of Los Angeles*, 82 Cal.App. 4th 419, 426-427, 98 Cal.Rptr.2d 144, 149 (2000).

[16] California Welfare & Institutions Code section (a)(1).

[17] *T.N.G. v. Superior Court*, 4 Cal.3d 767, 778, 484 P.2d 981, 987, 94 Cal.Rptr. 813, 819 (1971).

[18] *In re Michael B.*, 8 Cal.App. 4th 1698, 1707, 11 Cal.Rptr.2d 290, 296 (1992).

When a third party petitions for disclosure of records under California Welfare & Institutions Code section 827(a)(1)(M), the juvenile court considers the interests of, not only the child, but also the petitioner and the public.[19] For example, in *In re Keisha T.*, the Court held that a request by the press for information relevant to "public awareness" may warrant disclosure of juvenile records.[20] In *Foster v. Superior Court,* the court held that, upon a showing of "plausible justification for inspection," a criminal defendant could obtain the prosecuting witnesses's juvenile records.[21] The court reasoned that a criminal defendant's constitutional right to confrontation and cross-examination trumps state law privacy considerations.[22]

The California District Court of Appeal decision in *Navajo Express v. Superior Court* is of particular interest.[23] The Court ruled that California Welfare & Institutions Code section 827 does not prevent discovery of a civil plaintiff's juvenile court records.[24] In that case, the adult plaintiff

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[19] *People v. Superior Court,* 107 Cal.App.4th 488, 492, 132 Cal.Rptr.2d 144, 147 (2003).

[20] *In re Keisha T.*, 38 Cal.App.4th 220, 240, 44 Cal.Rptr.2d 822, 833 (1995).

[21] *Foster v. Superior Court,*107 Cal.App.3d 218, 229-230, 165 Cal.Rptr. 701, 708-709 (1980).

[22] *Id.*, 107 Cal.App.3d at 229, 165 Cal.Rptr. at 708.

[23] *Navajo Express v. Superior Court*, 186 Cal.App.3d 981, 231 Cal.Rptr. 165 (1976).

[24] *Id.*, 186 Cal.App.3d at 985, 231 Cal.Rptr. at 168-169.

suffered brain damage when defendant's truck struck him. Plaintiff claimed that the injury caused him to engage in violent behavior and that he had no prior history of emotional problems. After the juvenile court denied defendant's motion to disclose plaintiff's juvenile records, the appellate court reversed, holding that relevancy to an issue raised by plaintiff constitutes good cause for discovery, and that the defendant's need for information outweighed the plaintiff's confidentiality interest. The court explicitly rejected plaintiff's contention that the state legislature's enactment of section 827 "reveals an intention that juvenile records not be subject to discovery in a civil action brought by the minor."[25] The court held that "the section itself contemplates that situations will exist where inspection by third parties will be permitted and puts the protection of confidentiality of the records within the discretion of the juvenile court."[26]

On the record before it, this Court need not revisit the question of whether the juvenile court records *were* discoverable in the underlying action. The District Court, in denying Respondent's motion to suppress the evidence contained in the juvenile court file, held that the records were discoverable.[27] The subject Ninth Circuit decision does not overrule – or even question – the District Court's decision on that point.[28]

From the Fourth Amendment perspective, it does not

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[25] *Id.*, 186 Cal.App.3d 985, 231 Cal.Rptr. at 167.

[26] *Id.* 186 Cal.App.3d at 985-986, 231 Cal.Rptr. at 167-168.

[27] App. B3-4, C3.

[28] *See Gonzalez v. Spencer, supra,* 336 F.3d at 835.

matter whether Petitioners followed the correct procedure for accessing Respondent's records under California Welfare & Institutions Code section 827(a)(1)(M). Petitioner's actions may have violated state law. (A debatable conclusion as Justice Fletcher's dissenting opinion demonstrates.[29]) But absent a reasonable expectation of privacy for the juvenile court's record in the context of Respondent's federal civil rights action against the County and its juvenile court, the Petitioners' access to the records did not violate his *Fourth Amendment* rights.

The Ninth Circuit mistakenly compared the situation in the present case to an illegal search that cannot be rectified by a later showing that a magistrate would have issued a search warrant if asked, or that government inevitably would have found the seized items anyway. On that basis, the Ninth Circuit reasoned that Respondent could obtain at least nominal damages, even though in the underlying action the court held, after the fact, that the juvenile court's records were discoverable.[30] However, the Ninth Circuit's reasoning is fallacious, because it erroneously assumes that the Fourth Amendment prohibits disclosure of juvenile court records. For the reasons already stated, it clearly does not.

The Ninth Circuit was troubled by the Petitioners' presumed violation of the requirement of California Welfare & Institutions Code section 827(a)(1)(M) and California Rules of Court rule 1423(b) for a court order granting access to juvenile court records. However, the statute and the rule create *procedural*, not *substantive* rights. Federal courts have

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[29] *Gonzalez v. Spencer, supra,* 336 F.3d at 836-839 (Fletcher, J., dissenting).

[30] *Gonzalez v. Spencer, supra,* 336 F.3d at 835.

explored and rejected the notion that *procedural* requirements for notice and hearing in advance of disclosure of information about juvenile offenders confer a *substantive* property or liberty interest. For instance, in *United States v. Jiles*, the Third Circuit Court of Appeals held that the government's use of a juvenile offender's photograph to enable a witness to identify him as the perpetrator of a crime, without first obtaining a court order for its production as required by state statute, did not violate the Fourteenth Amendment, because the statute did not confer a substantive right on the juvenile.[31] As the Court stated:

> "In the instant case, the state created a procedure to protect juveniles from having their juvenile records released to the public. [Citation omitted.] Within that procedure was a special safeguard requiring that a court order be secured before photographs from juvenile records are released to other law enforcement officials. This safeguard, while helpful to the state in ensuring that such records are not released to the general public, did not create a property interest on behalf of the appellee."[32]

Similarly, in *McCrary v. Jetter*, the Court held that a state statute prohibiting the removal of a youthful offender's photograph from his juvenile court file without the required court order did not create a substantive right.[33] On the basis

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[31] *United States v. Jiles*, 658 F.2d 194 (3rd Cir. 1981)

[32] *Id.*, 658 F.2d at 200.

[33] *McCrary v. Jetter*, 665 F.Supp. 182 (E.D.N.Y. 1987).

of *Hewitt v. Helms*[34] and *Olim v. Wakinekonal*,[35] the Court held that the statute's procedural requirement for a court order did not confer a property or liberty interest on the juvenile. The critical distinction, in that Court's view, was whether the statute's non-disclosure provisions were mandatory (creating a substantive right) or discretionary (creating only a procedural right). The Court determined that the statute in question "does not, in any way, circumscribe the court's discretion in authorizing a release of the files."[36] Therefore, the government's failure to obtain a court order for disclosure of the juvenile's photograph did not create a property or liberty interest.

In this regard, the provisions of Welfare & Institutions Code section 827(a)(1)(M) and California Rules of Court rule 1423(b) deserve consideration. The former imposes *no* criteria for the court to consider in ruling on a petition for disclosure of juvenile court records. The latter states only that: "[in] determining whether to authorize inspection or release of juvenile court records, in whole or in part, the court shall balance the interests of the child and other parties to the juvenile court proceeding, the interests of the petitioner, and the interests of the public." This scheme obviously invests broad discretion in the court. It is procedural, and does not confer substantive rights on the juvenile.

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[34] *Hewitt v. Helms*, 459 U.S. 460, 471-472 (1983).

[35] *Olim v. Wakinekonal*, 461 U.S. 238, 249-250 (1983).

[36] *McCrary v. Jetter, supra*, 658 F.2d at 185.

It must be added that in *Sandin v. Conner*, a prisoners' rights case, this Court overruled *Hewitt*[37] and *Olim* [38] on the ground that they unnecessarily distinguished between mandatory and discretionary rules.[39] *Sandin* held that *neither* confers substantive rights in the context of prison regulations. That decision only strengthens the conclusion that Petitioner's alleged transgression of Welfare & Institutions Code section 827(a)(1)(M) and California Rules of Court rule 1423(b) did not violate Respondent's rights under the Fourth or Fourteenth Amendment. Respondent may have a state law remedy, but he does not have a federal remedy for the alleged violation of his civil rights.

The Fourteenth Amendment due process cases, cited above, bring the Amici's argument full circle. Respondent has no ownership of the juvenile court's records; nor did California Welfare Institutions Code section 827(a)(1)(M) and California Rules of Court rule 1423(b) confer a property interest upon him. One may not presume, therefore, that the Petitioners seized "his papers." Instead, Respondent is confined to arguing that he had a reasonable expectation of privacy in those records. For the reasons previously discussed, that argument must fail.

No Fourteenth Amendment Violation

In *Whalen v. Roe* this Court explained that one facet of the Fourteenth Amendment right to privacy protects "the individual interest in avoiding disclosure of personal

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[37] *Hewitt v. Helms, supra*, 459 U.S. 460.

[38] *Olim v. Wakinekonal, supra*, 461 U.S. 238.

[39] *Sandin v. Conner*, 515 U.S. 472 (1995).

matters."[40] The Ninth Circuit held that Petitioner violated Respondent's Fourteenth Amendment privacy interest by inspecting juvenile records pertaining to him without court authorization.[41] But this finding conflicts with this Court's repeated admonition that state procedure does not define the parameters of constitutional interests.[42]

For that reason, the Eighth and Tenth Circuit Courts of Appeals have held that illegal disclosure of criminal records does not implicate the Fourteenth Amendment right to privacy.[43] And the Sixth Circuit has treated state law violations as irrelevant to the right to privacy inquiry.[44]

These decisions clarify that *Whalen*'s "individual interest" arises, not from state procedure, but from "more specific . . . guarantees" in the Constitution itself.[45] Thus, a Fourteenth Amendment right of privacy only encompasses matters that are "fundamental" or "implicit in the concept of ordered liberty." [46]

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[40] *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

[41] *Gonzalez v. Spencer, supra*, 336 F.3d at 835.

[42] *Hewitt v. Helms, supra*, 459 U.S. 460; *Sandin v. Conner, supra*, 515 U.S. 472.

[43] *Eagle v. Morgan*, 88 F.3d 620 (8th Cir. 1996); *Nilson v. Layton City*, 45 F.3d 369 (10th Cir. 1995).

[44] *J.P. v. DeSanti*, 653 F.2d 1080, 1087 (1981).

[45] *Paul v. Davis*, 424 U.S. 693, 713 (1976).

[46] *Palko v. Conneticut*, 302 U.S. 319, 325 (1937).

This Court has decided that an individual holds no such privacy interest in his criminal record.[47] Further, in *J.P v. DeSanti*, the Sixth Circuit Court of Appeals held that, even allowing for the sensitive nature of juvenile proceedings, minors have no constitutional interest that prevents disclosure of the juvenile court records to community groups.[48]

J.P. v. DeSanti, supra, closely parallels the present case. A class of plaintiffs alleged that a county juvenile court violated juveniles' constitutional right of privacy when it disseminated juvenile probation reports and records to 55 governmental, social, and religious agencies that were members of a "social services clearing house," in contravention of a state statute that made probation department reports and records confidential. In holding that a juvenile does not have a right to privacy for information in juvenile court records, the Sixth Circuit said:

> "[T]he fact that the Constitution protects several specific aspects of individual privacy does not mean that it protects all aspects of individual privacy. Nor is there indication in any of the above decisions of a constitutional right to nondisclosure of juvenile court records. Rather, such disclosure is indistinguishable from that permitted in Paul v. Davis,

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[47] *Paul v. Davis, supra,* 424 U.S. 693; *J.P. v. DeSanti, supra,* 653 F.2d 1080; *Cutshall v. Sundquist,* 193 F.3d 466 (6th Cir. 1999); *Cline v. Rogers*, 87 F.3d 176 (6th Cir. 1996); *Hodge v. Jones,* 31 F.3d 157 (4th Cir. 1994); *Nilson v. Layton City, supra*, 45 F.3d 369; *Eagle v. Morgan, supra*, 88 F.3d 620.

[48] *J.P. v. DeSanti, supra*, 653 F.2d 1080.

> 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). There the respondent alleged that circulation to merchants by police of the fact of his arrest for shoplifting (he had not been convicted) violated his constitutional right to privacy. The Court recognized that 'zones of privacy may be created by more specific constitutional guarantees . . . ' Id. at 712-713, 96 S.Ct. at 1165- 1166. However, the Court held, 'personal rights found in (the) guarantee of personal privacy must be limited to those which are 'fundamental' or 'implicit in the concept of ordered liberty' . . . Respondent's claim is far afield from (the privacy) line of decisions.' "[49]

Two federal courts have gone the other way, and found that non-disclosure statutes create a Fourteenth Amendment right to privacy in juvenile court records.[50] In *Soucie v. County of Monroe*, the District Court disagreed with *DeSanti* and held that "[t]he plaintiff's interest in non-disclosure is predicated on statutorily conferred expectations of privacy, and is thus well-founded and to a large extent defined by Fourth Amendment privacy motions."[51]

This court should grant the Petition for Certiorai to resolve the conflict between Circuit Courts of Appeals on the question of whether the Fourteenth Amendment creates a right

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[49] *Id.* at 713, 96 S.Ct. at 1166.

[50] *Doe v. Webster*, 606 F.2d 1226 (D.C. Cir. 1979); *Soucie v. County of Monroe,* 736 F.Supp.3d (W.D.N.Y. 1990).

[51] *Id.*, 736 F.Supp. 37.

of privacy in juvenile court files. However, this Court should also address whether, if such a right exists, the Petitioner violated it under the circumstances of the present case. After all, Petitioners accessed information relevant to Respondent's suit against them. As noted in the previous section, it is well established that one waives privacy rights by putting confidential information at issue. Thus, in this particular situation, Respondent's interest in privacy can hardly be described as "fundamental" or implicit in the concept ordered liberty. His claim to a constitutional right to privacy in his juvenile records–tenuous to begin with–stumbles fatally on this ground.

The California District Court of Appeal recently addressed this point in *Rosales v. City of Los Angeles.*[52] In an underlying suit, the City and a City police officer, Rosales, were sued based on the officer's alleged inappropriate sexual conduct with an under-age female police Explorer Scout. In response to the plaintiff's request for production of documents, the City Attorney provided Rosales' confidential personnel files to the plaintiff without complying with statutory procedures requiring consent or court order before releasing the files. Rosales then sued the City on a state law claim for "invasion of the right of privacy" and a Fourteenth Amendment claim for violation of the right of privacy. With respect to the state law claim, the court held:

> "Rosales has failed to state a claim for invasion of privacy because he could not have a reasonable expectation that his personnel records would not be disclosed in the litigation relating to the Explorer Scout. As we have

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[52] *Rosales v. City of Los Angeles*, 82 Cal.App.4th 419, 98 Cal.Rptr. 144 (2000)

> already made clear, the privilege of confidentiality is conditional and must be balanced with the right of a litigant to obtain information or records that are material to the subject matter of the litigation. In an action alleging sexual misconduct during his employment as an officer, as well as allegations of negligent hiring and negligent entrustment on the part of the City, it would be completely unreasonable for Rosales to expect that his personnel file would not be disclosed to plaintiff's counsel or used by the City in its defense to that action."[53]

And with respect to the Fourteenth Amendment privacy claim, the Court held:

> "The United States Supreme Court has held that the constitutional right to privacy protects individuals from government disclosure of personal information (*Whalen v. Roe* (1977) 429 U.S. 589, 599-600 [97 S.Ct. 869, 876-877, 51 L.Ed.2d 64].) In determining whether information is of such a highly personal nature that it demands constitutional protection, the party asserting the right must have a legitimate and reasonable expectation of privacy. (*Nilson v. Layton City* (10th Cir. 1995) 45 F.3d 369, 371.) As we have already concluded in connection with the invasion of privacy claim under state law, Rosales could

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[53] *Id.*, 82 Cal.App.4th at 428-429, 98 Cal.Rptr. 150.

> have no reasonable expectation of privacy that his personnel file would not be disclosed in the litigation relating to the Explorer Scout. This is especially so given the type of allegations made against the City and Rosales as its employee. Rosales has thus failed to state a cause of action for violation of his federal civil rights."[53]

In the present case, surely there could be no expectation of privacy where Respondent himself initiated the litigation that led to the review of his records.

CONCLUSION

Amicus Curiae CSAC respectfully requests the Court to grant the Petition for Writ of Certiorai.

September 12, 2003

Respectfully submitted,

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[53] *Id.*, 82 Cal.App.4th at 431, 98 Cal.Rptr.2d at 152